No. 97-330

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CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1997

BVP MANAGEMENT ASSOCIATES,
Petitioner,

v.

ROBERT FREDETTE,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 112 F.3d 1503 (11th Cir. 1997). The opinion of the United States District Court for the Middle District of Florida is reported at 905 F.Supp. 1034 (M.D. Fla. 1995).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on May 22, 1997. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §2000e-2 provides, in pertinent part:

(a) Employer Practices. It shall be an unlawful employment practice

for an employer - -

(1) To fail or refuse to hire or to discharge any individual, or otherwise

to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race,

color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Basis of Jurisdiction In The First Instance And Procedural History

Respondent Robert Fredette (hereinafter "Fredette"), filed this action on March 17, 1994, in the United States District

Court for the Middle District of Florida. His original complaint contained three counts, one under 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"), one under the Florida Human Rights Act, Fla. Stat. § 760.01 *et seq.*, and one under 29 U.S.C. § 201 (hereinafter "the Fair Labor Standards Act"). His allegations under Title VII and the Fair Labor Standards Act provided federal question jurisdiction for the United States District Court. 42 U.S.C. §2000e-5(f)(3). His claims under Title VII and the Florida Human Rights Act were grounded in alleged sexual harassment by his male supervisor to which he was allegedly subjected while an employee of the Buena Vista Palace Hotel. Petitioners BVP Management Associates, *et al.* (hereinafter BVP") moved on May 9, 1995 for summary judgment on the ground that Title VII and the Florida Human Rights Act do not encompass claims of "same-sex" sexual harassment.

United States District Judge G. Kendall Sharp granted BVP's Motion with respect to Counts I and II of the Complaint

on September 11, 1995, holding that "[a]ny expansion of Title VII or the FHRA that would include such a cause of action is for either Congress or the Florida legislature, and not this court, to make." Appendix C at 6. On September 20, 1995, Fredette settled and stipulated to dismiss with prejudice Count III of the Complaint, his claim under the Fair Labor Standards Act. The District Court closed the case on September 20, 1995.

Fredette filed an appeal with the United States Court of Appeals for the Eleventh Circuit on September 21, 1995. The Court of Appeals issued an order reversing the judgment of the District Court on May 22, 1997. Petitioners filed a Motion to Stay the Mandate of the Court of Appeals on June 12, 1997. BVP's Motion was granted on July 9, 1997, to extend until August 20, 1997, or until the filing of this Petition.

STATEMENT OF THE FACTS

District Judge Sharp adopted the facts found by Magistrate Judge David Baker. Magistrate Baker noted that,

because the action came before the Court on a motion for summary judgment, all unrebutted statements in Plaintiff's affidavit and deposition would be assumed to be true. (RII-81) The Magistrate's fact findings are as follows:

Mr. Fredette was hired as a back waiter at Arthur's 27 Restaurant on April 28, 1989. Arthur's 27, so named because it is located on the twenty-seventh floor of the Buena Vista Palace Hotel in Lake Buena Vista, Florida, is operated by Defendant BVP. At the time of Mr. Fredette's hiring, Mr. Sunshine was the maitre d' or manager of Arthur's 27. In that position, Mr. Sunshine had influence over the hiring, firing, scheduling, and teaming of waiters.

Mr. Fredette alleges that Mr. Sunshine, who is homosexual, began to make sexual advances toward him soon after his hiring. Mr. Sunshine approached Mr. Fredette in a secluded area of the restaurant and told him that he knew a "good way" for Mr. Fredette to be promoted to captain. When

Mr. Fredette responded that he preferred to be promoted because of hard work, Mr. Sunshine responded with a lewd gesture, said that "hard work is exactly what it takes," and laughed. Soon afterward, Mr. Fredette voiced an objection to Mr. Sunshine's behavior. Mr. Sunshine told him that he could complain to personnel, but previous complaints had caused little harm to Mr. Sunshine's employment record. Despite refusing to engage in sexual behavior with Mr. Sunshine, Mr. Fredette was promoted to captain on November 28, 1989.

Over the course of Mr. Fredette's employment at Arthur's 27, Mr. Sunshine repeatedly propositioned him sexually. According to the sworn testimony of Mr. Fredette and several other former waiters, Mr. Sunshine would ogle and proposition male waiters, including Mr. Fredette. He would also make obscene gestures and gesticulations regularly. On several occasions when Mr. Fredette confronted him about his actions, Mr. Sunshine responded, "You can do what you want,

but I control your income." Mr. Sunshine also apparently promoted a back waiter to captain and assigned him to profitable tables in exchange for sexual favors, despite the subordinate's lack of experience and seniority. When Mr. Fredette went to an assistant manager to complain about Mr. Sunshine's favoritism toward gay men, he was told that "the gay issue is a dead issue."

Mr. Sunshine also engaged in offensive sexual behavior in non-employment contexts. In social settings, he made sexual comments and suggestions to Mr. Fredette and engaged in explicit sexual conduct. Mr. Sunshine's sexual partner also told Mr. Fredette and others that they could get better table assignments, and thereby better tips, by engaging in sexual conduct with Mr. Sunshine.

On December 31, 1992, Mr. Sunshine grabbed Mr. Fredette's arm, swung him around, and stared at his groin. He then made an obscene comment about Mr. Fredette's

appearance. Mr. Fredette grew distraught at Mr. Sunshine's continuing unwanted attention. On January 3, 1993, Mr. Fredette reported to David Mitchell, then Human Resources Manager at the hotel. He told Mr. Mitchell that he had seen a counselor and lodged a sexual harassment complaint against Mr. Sunshine. Mr. Fredette enumerated a number of offensive sexual comments and acts that Mr. Sunshine had committed. Later that day, another waiter verified many of Mr. Fredette's complaints. Max Suzenaar, then Director of Human Resources at the hotel, met with Mr. Sunshine as a result of the complaints. Although Mr. Sunshine denied most of the allegations, he was issued a written warning. Over the next year, two other employees complained of sexual harassment by Mr. Sunshine. Approximately four years earlier, Mr. Suzenaar had received a complaint during the exit interview of Ralph Kraus, another waiter, which described sexual harassment by Mr. Sunshine. No action was taken upon Mr. Kraus' grievance.

After Mr. Fredette lodged a complaint with human resources, his interaction with Mr. Sunshine and other waiters changed. Mr. Sunshine no longer harassed him sexually, but he began to enforce against Mr. Fredette workplace rules which had otherwise been unenforced. He reprimanded Mr. Fredette for having a veal bone misplaced and told him that he was not to speak to other waiters. Mr. Sunshine assigned Mr. Fredette to few and worse-tipping tables. Another server, who Mr. Fredette contended was a confederate of Mr. Sunshine's, filed a complaint alleging that Mr. Fredette had threatened him. Mr. Fredette felt that the work environment was too difficult to withstand and, on the advice of his doctor, resigned on February 6, 1993.

REASONS FOR DENYING THE PETITION

The Court should deny the petition now because it is already considering the issue of whether same-sex sexual harassment is actionable under Title VII in *Oncale v. Sundowner*

Offshore Services, Inc.,83 F.3d 118 (5th Cir. 1996), *cert. granted. 65 U.S.L.W. 3814 (June 9, 1997).* On the other hand, if the Court does not deny the Petition now, Fredette prefers that it grant certiorari so that it may decide this case and *Oncale* together, rather than hold this case and defer ruling on the Petition until it delivers judgment in *Oncale.*

The present case involves a fact scenario different from *Oncale* in that the perpetrator in this case is clearly identified in the record as a homosexual and the victim a heterosexual. Furthermore, Fredette, unlike Oncale, did not work in an all-male environment. The Eleventh Circuit deemed the different sexual orientations of perpetrator and victim in the present case to be a significant factor in its decision. It followed *Wrightson v. Pizza Hut of America, Inc.*, 99 F.2d 138 (4th Cir. 1996) which found same-sex sexual harassment to be actionable where it was based upon sexual attraction between perpetrator and victim. The Eleventh Circuit declined to reach what it deemed the more

difficult question of sexual harassment occurring in the context of heterosexual males "razzing" or "hazing" other heterosexual males. The issue of same-sex sexual harassment in the "razzing" or "hazing" context may be more nearly the issue in *Oncale* where the record does not reveal the sexual orientations of perpetrators and victim. Were the Court in *Oncale* not to decide whether sexual harassment is actionable where a homosexual sexually harasses a heterosexual in a mixed-gender environment, a stay of the present case would be of no benefit.

CONCLUSION

Fredette prefers that the Court deny the Petition. On the other hand, Fredette prefers that the Petition be granted so that both cases may be heard together, rather than grant Petitioner's alternative request that this case be held and ruling deferred until a decision in *Oncale*. *Oncale* may never reach the issue in Fredette of whether same-sex sexual harassment of a heterosexual by a homosexual is unlawful under Title VII.

Respectfully submitted,

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